

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ALLEN R. MILLER,

Plaintiff,

Case No. 2:16-cv-01070-JAD-PAL

V.

NATHAN T.H. LLOYD,

Defendant.

REPORT OF FINDINGS AND RECOMMENDATION

(2nd Am. Compl. – ECF No. 13)

12 This matter is before the court for a screening of Plaintiff Allen R. Miller's Second
13 Amended Complaint (ECF No. 13). This screening is referred to the undersigned pursuant to 28
14 U.S.C. § 636(b)(1)(B) and LR IB 1-4 of the Local Rules of Practice.

BACKGROUND

I. THE ORIGINAL COMPLAINT (ECF No. 5)

17 Mr. Miller is proceeding in this action pro se and has received permission to proceed *in*
18 *forma pauperis*. Order (ECF No. 4). Miller initially submitted a three-page hand-written
19 “Complaint” (ECF No. 5). The filing attached numerous documents, including correspondence
20 by the U.S. Equal Employment Opportunity Commission and the Nevada Department of
21 Employment, Training and Rehabilitation, medical records, and a police report among others. The
22 court reviewed the Complaint and determined that Miller was attempting to allege violations of
23 Title VII of the Civil Rights Act for discrimination based on religion, race, age, and retaliation.
24 Order (ECF No. 4). However, the Complaint did not comply with LR IA 10-2, which provides
25 the required format for court filings. *Id.* In addition, the Complaint did not clearly identify which
26 entity or individual Mr. Miller sought to name as a defendant. *Id.* Thus, the court dismissed the
27 Complaint with leave to amend within 30 days. *Id.*

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1 **II. THE AMENDED COMPLAINT (ECF No. 6)**

2 Mr. Miller filed an Amended Complaint (ECF No. 6) using the court's form complaint for
 3 employment discrimination. The court reviewed the Amended Complaint and issued a 15-page
 4 Screening Order (ECF No. 12) explaining numerous pleading deficiencies. The Amended
 5 Complaint named individual defendants Nathan T.H. Lloyd, Ray Brown, Duane Finley, Elgen
 6 Samuel, and Jason Rucker, who cannot be held liable for damages under Title VII of the Civil
 7 Rights Act, 42 U.S.C. §§ 2000e–2000e-17 (“Title VII”); the Age Discrimination in Employment
 8 Act, 29 U.S.C. §§ 621–634 (“ADEA”); and the Americans with Disabilities Act, 42 U.S.C.
 9 §§ 12112–12117 (“ADA”). As a result, the individual defendants were dismissed from this action.
 10 Mr. Miller’s allegations sufficiently stated Title VII claims for racial and religious discrimination.
 11 However, the Screening Order dismissed the claims for disability and age discrimination and
 12 retaliation under the ADA, ADEA, and Title VII with leave to file a second amended complaint.
 13 Although he made some relevant allegations, Miller failed to plead essential factual elements under
 14 each of these statutes to state plausible claims. Additionally, his claim for national origin
 15 discrimination was dismissed without leave to amend as amendment was futile.

16 The court instructed the Clerk of Court to mail Mr. Miller another blank form complaint
 17 for employment discrimination claims. Miller was informed that a second amended complaint
 18 must contain a short and plain statement of: (1) the grounds for the court’s jurisdiction; (2) any
 19 claim he has showing he is entitled to relief; and (3) a demand for the relief he seeks. The
 20 Screening Order stated:

21 the court cannot refer to a prior pleading (*i.e.*, the original complaint or the amended
 22 complaint) in order to make the second amended complaint complete. This means
 23 that Miller must restate his allegations supporting the Title VII claims for racial and
 24 religious discrimination if he chooses to file a second amended complaint.

25 *Id.* at 14. However, if no second amended complaint was filed, the court would enter an order
 26 directing issuance of summons and service of the Amended Complaint on the Bellagio on the two
 27 plausible claims. *Id.* at 13.

28 **III. THE SECOND AMENDED COMPLAINT (ECF No. 13)**

29 Mr. Miller timely filed a Second Amended Complaint (ECF No. 13). Miller checked all
 30 the boxes on the form indicating that this action involves claims under Title VII, ADEA, and ADA.

1 He also indicates that other federal law and relevant state, city or county law may form a basis for
 2 discrimination, but no specific statutes are referenced. In the “Statement of the Claim” section
 3 III.A, he checked boxes showing that the discriminatory conduct of which he complains in this
 4 action includes: (i) a failure to hire him, (ii) termination of his employment, (iii) failure to promote
 5 him, (iv) failure to accommodate his disability, (v) unequal terms and conditions of his
 6 employment, (vi) retaliation, and (vii) other acts such as “religion, battery in workplace [sic].” *Id.*
 7 at 4. He believes the defendants are still committing these acts against him. *Id.* Miller alleges
 8 defendants discriminated against him based on his race (Native American), color (mixed race),
 9 religion (“Christian, spiritual”), national origin (Kansas), age (44 years old), and disability or
 10 perceived disability (eye and leg injury). *Id.* Section III.E provides space for plaintiffs to state the
 11 facts of their case and instructs them to attach additional pages as necessary. *Id.* However, Miller
 12 failed to provide any facts of his case. With regard to damages, Miller asks for the following:

13 All these years of mental stress from incidents and financial hardship, back pay
 14 since July 25, 2014 to present day. Damage of my employment record. Bad
 15 reference remove bad reference. Pay for my photo [unreadable] contacts for rest of
 life pay for my eye where for rest of my life glasses contacts was qualified to be
 promoted to [unreadable] lost pay. [sic]

16 *Id.* at 5.

17 DISCUSSION

18 Pursuant to 28 U.S.C. § 1915(e), federal courts must screen all IFP complaints and any
 19 amended complaints before allowing the case to move forward, issuing summonses, and requiring
 20 a responsive pleading. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (§ 1915(e)
 21 applies to “all in forma pauperis complaints”). If a complaint states a valid claim for relief, the
 22 court will direct the Clerk of Court to issue summons to the defendant(s) and the plaintiff must
 23 then serve the summons and complaint within 90 days. *See Fed. R. Civ. P. 4(m)*. When a court
 24 dismisses a complaint pursuant to § 1915(e), a plaintiff is ordinarily given leave to amend with
 25 directions as to curing its deficiencies, unless it is clear from the face of the complaint that the
 26 deficiencies could not be cured by amendment. *Cato v. United States*, 70 F.3d 1103, 1106 (9th
 27 Cir. 1995).

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1 Allegations in a *pro se* complaint are held to less stringent standards than formal pleading
 2 drafted by lawyers. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Hebbe v. Pliler*, 627 F.3d 338,
 3 342 n.7 (9th Cir. 2010). However, *pro se* litigants “should not be treated more favorably than
 4 parties with attorneys of record,” *Jacobsen v. Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986); rather,
 5 they must follow the same rules of procedure that govern other litigants. *Ghazali v. Moran*, 46
 6 F.3d 52, 54 (9th Cir. 1995).

7 Federal courts are required to dismiss an IFP action if the complaint fails to state a claim
 8 upon which relief may be granted, is legally “frivolous or malicious,” or seeks monetary relief
 9 from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). The standard for
 10 determining whether a plaintiff fails to state a claim upon which relief can be granted under § 1915
 11 is the same as the standard under Rule 12(b)(6) of the Federal Rules of Civil Procedure¹ for failure
 12 to state a claim. *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). A district court may
 13 dismiss a plaintiff’s complaint for “failure to state a claim upon which relief can be granted.” Fed.
 14 R. Civ. P. 12(b)(6). Review under Rule 12(b)(6) is essentially a ruling on a question of law. *N.*
 15 *Star Intern. v. Ariz. Corp. Comm’n*, 720 F.2d 578, 580 (9th Cir. 1983).

16 A properly pled complaint must provide “a short and plain statement of the claim showing
 17 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *accord Bell Atlantic Corp. v. Twombly*,
 18 550 U.S. 544, 555 (2007). The simplified pleading standard set forth in Rule 8(a) applies to all
 19 civil actions with limited exceptions. *Alvarez v. Hill*, 518 F.3d 1152, 1159 (9th Cir. 2008).
 20 Although Rule 8 does not require detailed factual allegations, it demands “more than labels and
 21 conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*,
 22 556 U.S. 662, 678 (2009) (citation omitted). This requires a plaintiff to state “enough facts to raise
 23 a reasonable expectation that discovery will reveal evidence” of the allegations charged. *Cafasso*,
 24 *United States ex rel. v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011)
 25 (quoting *Twombly*, 550 U.S. at 556). Mere recitals of the elements of a cause of action supported
 26 only by conclusory allegations do not suffice. *Iqbal*, 556 U.S. at 679–80. A complaint “must

27 ¹ Any reference to a “Rule” or the “Rules” in this Report of Findings and Recommendation refer to the
 28 Federal Rules of Civil Procedure.

1 contain sufficient allegations of underlying facts to give fair notice and to enable the opposing
 2 party to defend itself effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Where the
 3 claims in the complaint have not crossed the line from plausible to conceivable, the complaint
 4 should be dismissed. *Twombly*, 550 U.S. at 570. Stated differently, the factual allegations “must
 5 plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to
 6 be subjected to the expense of discovery and continued litigation.” *Starr*, 652 F.3d at 1216.

7 Here, the court granted Ms. Miller leave to amend, but instead of curing the deficiencies of
 8 his Amended Complaint, he filed a Second Amended Complaint (ECF No. 13) completely devoid
 9 of factual allegations. The Second Amended Complaint contains nothing more than checked boxes
 10 indicating the types of discriminatory conduct he intends this action to include, such as a failure to
 11 promote him or accommodate his disability, and termination of his employment. *Id.* at 4, Sec.
 12 III.A. Merely identifying the types of discriminatory conduct at issue without factual allegations
 13 is insufficient to state an actionable claim for relief. In addition, merely identifying the alleged
 14 bases of the discrimination—race (Native American), color (mixed race) religion (“Christian,
 15 spiritual”), national origin (Kansas), age (44 years old), and disability or perceived disability (eye
 16 and leg injury)—is not enough to state plausible claims. Because Miller failed to allege any facts
 17 to support a cause of action, the Second Amended Complaint fails to state any colorable claims.

18 A plaintiff who is granted leave to cure pleading deficiencies but fails to do so can be
 19 subject to dismissal without leave to amend yet again. *Leadsinger, Inc. v. BMG Music Publ'g*,
 20 512 F.3d 522, 532 (9th Cir. 2008). The Ninth Circuit has held it is reasonable for a district court
 21 to conclude that a plaintiff “simply *cannot* state a claim” when he “knowingly and repeatedly
 22 refuses to conform his pleadings to the requirements of the Federal Rules.” *Knapp v. Hogan*, 738
 23 F.3d 1106, 1110 (9th Cir. 2013) (quoting *Paul v. Marberry*, 658 F.3d 702, 705 (7th Cir. 2011)).
 24 The court gave Miller explicit instructions in the 15-page Screening Order (ECF No. 12) regarding
 25 the required elements of employment discrimination claims. In addition, Miller was expressly
 26 warned that the court could not refer to a prior pleading (*i.e.*, the Amended Complaint) to make
 27 the Second Amended Complaint complete, and Miller was required to restate his allegations
 28 supporting the Title VII claims for racial and religious discrimination if he chose to amend. Yet

1 he alleged no facts whatsoever in the Second Amended Complaint. Because Miller has amended
2 his pleadings two times but still has not provided a short and plain statement of his claims, the
3 court concludes that any further amendment would be consistent with the deficient allegations
4 repeated in his prior complaints, which indicate that additional amendment would be futile. The
5 court therefore recommends dismissal with prejudice.

6 || Accordingly,

IT IS RECOMMENDED that:

8 1. Plaintiff Allen R. Miller's Second Amended Complaint (ECF No. 13) be **DISMISSED**
9 **with prejudice** for failure to state a claim upon which relief may be granted.
10 2. The Clerk of Court be directed to close this case and enter judgment.

11 || Dated this 14th day of January 2019.

Peggy A. Teer
PEGGY A. TEER
UNITED STATES MAGISTRATE JUDGE

NOTICE

This Report of Findings and Recommendation is submitted to the assigned district judge pursuant to 28 U.S.C. § 636(b)(1) and is not immediately appealable to the Court of Appeals for the Ninth Circuit. Any notice of appeal to the Ninth Circuit should not be filed until entry of the district court’s judgment. *See Fed. R. App. P. 4(a)(1).* Pursuant to LR IB 3-2(a) of the Local Rules of Practice, any party wishing to object to a magistrate judge’s findings and recommendations of shall file and serve *specific written objections*, together with points and authorities in support of those objections, within 14 days of the date of service. *See also 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72.* The document should be captioned “Objections to Magistrate Judge’s Report of Findings and Recommendation,” and it is subject to the page limitations found in LR 7-3(b). The parties are advised that failure to file objections within the specified time may result in the district court’s acceptance of this Report of Findings and Recommendation without further review. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). In addition, failure to file timely objections to any factual determinations by a magistrate judge may be considered a waiver of a

1 party's right to appellate review of the findings of fact in an order or judgment entered pursuant to
2 the recommendation. *See Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991); Fed. R. Civ. P.
3 72.

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